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Nos. 92-919 and 92-968

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IN THE

Supreme Court of the United States

October Term, 1992

Supreme Court, U.S.
FILED
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MORRIS J. EISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

GERALDINE G. MORGANTI AND DENNIS RELLA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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QUESTION PRESENTED

1. Whether the matter should be remanded to the United States Court of Appeals for the Second Circuit in light of Reves v Ernst & Young (91-886) 52 CrL 2248, decided after the time of Petitioners' last filing?

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October Term, 1992

MORRIS J. EISEN, PETITIONER

V.

UNITED STATES OF AMERICA

GERALDINE G. MORGANTI AND DENNIS RELLA,

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to U.S.Sup.Ct. Rule 15.7, 28 U.S.C.A., this supplemental brief is

submitted by Petitioners Morris J. Eisen, Geraldine G. Morganti and Dennis Rella, to call attention to a new case not available at the time of Petitioners' last filing. On March 3, 1993, the Court decided Reves v Ernst & Young (91-886) 52 CrL 2248, which significantly changed the law applicable to this RICO prosecution, 18 U.S.C. §1961, et seq. For the reasons that follow, we respectfully submit that this matter should be remanded to the United States Court of Appeals, for the Second Circuit, for reconsideration in light of Reves.

In Reves v Ernst & Young, supra, 52 CrL 2248, the Court held that, pursuant to 18 U.S.C. §1962(c), which makes it unlawful "for any person employed by or associated with any enterprise *** to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

racketeering activity", a defendant "must have some part in directing those affairs" (52 CrL at p 2251). Noting, inter alia, that "[a]n enterprise is 'operated not just by upper management but also lower-rung participants in the enterprise who are under the direction of upper management" (52 CrL at p 2252), the Court left unresolved the question "how far §1962(c) extends down the ladder of operation" (52 CrL at p 2252, n9).

When Petitioners were jointly tried with their four co-defendants, all of whom have also petitioned for certiorari, the controlling and well-settled law on this subject in the Second Circuit was found in United States v Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. den., 452 U.S. 961 (1981), in which the court set forth a far broader test than Reves for determining whether "a person employed by or associated with any enterprise ***

conduct[ed] or participate[d], directly or indirectly, in the conduct of such enterprise's affairs" (18 U.S.C. § 1962[c]). According to the Scotto court, "one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise" (641 F.2d at p 54).

The Scotto court rejected the appellant's contention that "the jury was required to find that the predicate acts 'concerned or related to the operation or management of the enterprise' and '[a]ffected the affairs of the [enterprise] in its essential functions'" (641 F.2d at p 54).

Similar to Petitioner Alan Weinstein (92-7394), Petitioner Dennis Rella was not an employee of the enterprise (Morris J. Eisen, P.C.). As alleged in the indictment, he was an "outside" private investigator, who regularly performed investigative services for the enterprise "having responsibility for assisting attorneys associated with the [enterprise] in preparing and trying numerous cases." Petitioner Rella was named in six predicate acts, two of which named him alone and three of which named him as acting with Petitioner Geraldine Morganti, also a non-lawyer, who was employed by the enterprise, but did not supervise or manage the legal staff.

Petitioner Geraldine Morganti was identified in the indictment as the office administrator. According to the evidence presented, Petitioner Morganti supervised the clerical staff. She had

no responsibility for the conduct of the legal work of the firm and did not participate in the investigation, preparation, or presentation of any of the cases that were identified in the predicate acts. Petitioner Morganti was named in six predicate acts, one of which named her alone and three of which named her as acting with Petitioner Rella.

In short, no evidence was presented that Petitioners Morganti or Rella were acting in an upper management capacity or that, at least insofar as several of the predicate acts naming them were concerned, they were acting under the direction of upper management personnel.

Petitioner Morris J. Eisen is analytically in a different position. As alleged in the indictment, he was "the sole shareholder and the principal attorney of the [enterprise]. He had ultimate authority over all of the

affairs of the [enterprise] ***." Out of some twenty-six (26) predicate acts, Petitioner Eisen was named in five. Though evidence at trial supported the contention that he was "upper management" within the meaning of Reves, Petitioner Eisen was named in an indictment, charging in two counts a violation of the anti-racketeering statute and conspiring to violate the anti-racketeering statute, with six co-defendants, several of whom were not "upper management", nor was it contended that they were acting under the direction of "upper management". Indeed many of the predicate acts charged "lower rung" employees of the enterprise, outside investigators, or both, without mentioning any "upper management" personnel such as Petitioner Eisen.

Petitioners did not litigate the "Reves" issue at trial nor did they expressly raise it on appeal to the

Second Circuit. To do so would have been "'patently futile'" (Ingber v Enzor, 841 F.2d 450, 454 [2d Cir. 1988]), given the well-settled law in the Second Circuit as it then existed. Plainly, the case was submitted to the jury under an erroneous standard, thereby prejudicing Petitioners Morganti and Rella's rights to a fair trial.

Petitioner Eisen was also substantially prejudiced because he was charged and tried with violating RICO with several individuals who, because of their status either in the enterprise, or as outside consultants, should never have been charged under RICO because they did not "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs" (18 U.S.C. §1962[c]) within the meaning of Reves. Particularly significant is the fact that, though the indictment contained

twenty-six predicate acts alleging violations of New York's bribery statutes (see N.Y. Penal Law §§ 200.00, 215.00 [Mck. 1988]) and the federal mail fraud statute (see 18 U.S.C.A. § 1341 [West. Supp. 1991]), none of these predicate acts were charged in separate counts as substantive violations of the criminal law.

Petitioner Eisen as an "upper management" employee of the enterprise was substantially prejudiced by having to defend against a RICO prosecution which included several co-defendants who were alleged to have engaged in several predicate acts which under Reves could not have been prosecuted under RICO.

Accordingly, as requested by Petitioner Alan Weinstein (92-7394), and as suggested by the government in its response to the Petition of Joseph Napoli, pro se (92-969), this matter

should be remanded to the Second Circuit for a full presentation of the issue in light of Reves v Ernst & Young, supra.

CONCLUSION

THIS MATTER SHOULD BE REMANDED TO THE SECOND CIRCUIT FOR RECONSIDERATION IN LIGHT OF REVES V ERNST & YOUNG

Dated: April 7, 1993

Respectfully submitted,

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